

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

UNITED STATES OF AMERICA,
ex rel. JIM SOUTHARD,

Plaintiff,

v.

KIPPER TOOL COMPANY,

Defendant.

Civil Action No.

2:23-cv-225-RWS

**DEFENDANT KIPPER TOOL COMPANY’S MOTION FOR LEAVE
TO FILE MOTION TO DISMISS COMPLAINT OUT OF TIME**

Defendant Kipper Tool Company (“KTC”), through undersigned counsel, respectfully files this motion for leave to file a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) and supporting memorandum of law, attached hereto as Exhibit A, out of time. In support of the motion, Defendant states as follows:

1. On November 21, 2023, this Court issued an Order directing the parties “to promptly confer with another regarding scheduling of the case.” Order [Dkt. 98]. The Order concluded: “Thereafter, counsel shall submit to the Court a status report regarding their consultation, and the Court will schedule a status conference with counsel.” *Id.*

2. On December 12, 2023, the Parties submitted a joint status report, as directed. [Dkt. 103] In that report, the Parties proposed a simultaneous briefing schedule for (a) Defendant’s renewed motion to dismiss the Complaint, to be re-filed with applicable Eleventh Circuit authority, and (b) Plaintiff’s motion for partial summary judgment. In the joint status report, however, Defendant also urged that the Parties should litigate the motion to dismiss first, before briefing any motion for summary judgment by Plaintiff. Plaintiff disputed this position.

3. Counsel for Defendant anticipated that the Court would schedule a status conference to discuss the Parties' positions, as it had indicated it would do in its November 21 Order. However, on the same day that the Parties filed the joint status report, the Court issued an Order adopting the Parties' simultaneous briefing schedule on their respective motions to dismiss and for partial summary judgment, with both motions due on January 12, 2024. [Dkt. 104]

4. Undersigned counsel David W. DeBruin has been admitted *pro hac vice* as counsel for Defendant Kipper Tool Company, and is lead counsel for Defendant. Mr. DeBruin has represented KTC in this matter dating back to 2016. The Complaint in this case [Dkt. 1] was filed in 2015. In April 2016, KTC was served a subpoena for documents issued by the General Services Administration ("GSA"). GSA directed compliance issues on the subpoena to the Department of Justice ("DOJ"). Mr. DeBruin has worked with DOJ regarding the subpoena served on KTC since April 2016. DOJ ultimately disclosed that it was investigating a *qui tam* complaint that had been filed against KTC. Mr. DeBruin worked with DOJ on this matter continuously until the time that DOJ declined to intervene in this action. After DOJ did so, Mr. DeBruin represented KTC, along with lawyers in his firm's San Francisco office, after the case was unsealed and during the time it was pending before the United States District Court for the Northern District of California. Mr. DeBruin has worked with KTC on various government contract matters for almost twenty years.

5. When this case was transferred to the United States District Court for the Northern District of Georgia, Tyler Smith entered an appearance for KTC. Mr. Smith practices law in Gainesville. Before this case was transferred to the Northern District of Georgia, Mr. Smith had no involvement with this litigation.

6. At the time this Court entered its December 12, 2023 Order, Mr. DeBruin was not yet authorized to receive electronic notice of filings in this case. As a result, the electronic notice

of the Court's Order indicated that Mr. DeBruin would be served by other means. As reflected on the Court's "Notice of Electronic Filing" for Docket 104:

2:23-cv-00225-RWS Notice has been delivered by other means to:

David W. DeBruin
Jenner & Block, LLP -DC
Suite 900
1099 New York Avenue, NW
Washington, DC 20001

7. As an officer of the Court admitted *pro hac vice* in this case, Mr. DeBruin represents that he did not receive the mailed copy of this Court's December 12, 2023 Order. Mr. DeBruin did not learn of the Order until January 17, 2024. On that date, Plaintiff's counsel sent an email to Mr. DeBruin, stating: "We noticed that you did not file a Motion to Dismiss last Friday and wanted to check in. Currently, there is no responsive pleading from Kipper Tool." Mr. DeBruin responded: "I am not aware of the Friday deadline you mention. Was there an order of the court I did not receive?" Counsel for Plaintiff responded: "The Court adopted our Joint Status Report on December 12, 2023, setting the briefing schedule. We understand that the renewed motions from both sides were due on Friday, January 12, 2024." Counsel for Plaintiff also provided Mr. DeBruin with a copy of the Court's Order.

8. After receiving a copy of the Order, Mr. DeBruin again checked with his assistant to determine whether a copy of that Order had arrived by mail. Mr. DeBruin's assistant confirmed that the Order had not been received by mail.

9. Mr. Smith was served an electronic copy of the December 12, 2023 Order. As new counsel on the matter, however, Mr. Smith understood that Mr. DeBruin would take responsibility for re-filing the motion to dismiss, a version of which Mr. DeBruin previously had filed with the

United States District Court for the Northern District of California. Mr. Smith mistakenly assumed that Mr. DeBruin would receive his own copy of the Order.

10. As lead counsel for Defendant, undersigned counsel regrets and takes full responsibility for the fact that Defendant failed to re-file its motion to dismiss on January 12, 2024, as directed by the Court. Defendant respectfully requests leave to file the motion out of time, one week later on January 19, 2024 (and two days after Mr. DeBruin received actual notice of the Order). This case has been pending for more than eight years, and this limited, one-week delay in the filing of Defendant's motion to dismiss will not prejudice the litigation or any party. Moreover, as shown in the attached memorandum of law in support of the motion to dismiss, the Complaint fails to state a claim for relief under directly applicable law of the Eleventh Circuit. It will aid in the efficient administration of this litigation and will further the interests of justice to require Plaintiff's Complaint to adhere to the standards recently underscored by the Court of Appeals in *United States ex rel. 84Partners, LLC v. Nuflo, Inc.*, 79 F.4th 1353 (11th Cir. 2023) and numerous other Eleventh Circuit cases, as explained in the attached memorandum of law.

11. Defendant has not failed to honor any other deadline or obligation set by the Court. Defendant's counsel will ensure that no other deadlines or obligations are ever missed. To assist in that regard, lead counsel Mr. DeBruin is now authorized to receive, and is receiving, electronic notices of all filings in the case.

12. Mr. DeBruin explained to Plaintiff's counsel what had occurred as described above, and asked whether Plaintiff would consent to this motion for leave to file the motion to dismiss out of time. Plaintiff's counsel responded that Plaintiff would not consent.

For the foregoing reasons, and any other reasons that may appear to the Court, Defendant Kipper Tool Company respectfully requests that the Court grant leave to Defendant to file the

motion to dismiss and memorandum of law, attached as Exhibit A, out of time. As this motion is contested, a proposed order is not attached.

Respectfully submitted,

/s/
David W. DeBruin

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